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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 824

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,
PETITIONER,

v.

LENA M. RODGERS,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW.

This case was tried to the court without a jury and, although the trial court filed no opinion it made and filed findings of fact and conclusions of law. (R. 34, 35) The only official report of this case is printed in 116 Fed. 2d 705. The District Court's findings of fact and conclusions of law are as follows:

"Findings of Fact.

1. Paul W. Rodgers was issued a policy of life insurance in the sum of $10,000 on February 28, 1935, in the defendant company, in which policy the plaintiff was named as beneficiary. A full year's premium was paid in advance and said policy had never been cancelled. Paul W. Rodgers was killed on August 4, 1935, and due proof of death was made by the plaintiff on August 24, 1935.

2. When it issued the policy of insurance herein, the defendant company had full notice and actual knowledge of all facts relating to the previous insurance record of Paul W. Rodgers which included the fact that Rodgers had been declined life insurance by the John Hancock Mutual Life Insurance Company in March, 1934.

3. Prior to the date when it issued the policy sued on the defendant company was in possession of facts which put the defendant on the alert and which were in conflict with statements contained in the application of Rodgers for the insurance policy sued on, which application was then being considered by the defendant. Those facts and the circumstances surrounding them were of a character such that ordinary diligence on the part of the defendant and inquiry based on such facts and made by the defendant to the sources available to it would have brought to the defendant, prior to the issuance of its insurance policy on his life, actual knowledge of Rodgers' previous rejection by John Hancock Mutual Life Insurance Company.

4. At the time Paul W. Rodgers made his application to the defendant insurance company for the policy issued in this case, said applicant Rodgers did not knowingly misstate any facts in said application, and did not knowingly misrepresent the facts respecting any matters inquired about in said application.

Conclusions of Law.

The Court concludes as a matter of law that:

I.

Prior to and at the time it issued the policy sued on the defendant had knowledge of the fact that the insured Rodgers had been declined insurance by John Hancock Mutual Life Insurance Company.

II.

By issuing its policy sued on herein, the defendant waived any defense based on misrepresentation which otherwise may have appeared in Rodgers' application made to defendant for insurance, and the defendant is estopped in law from asserting as a defense in this action the misrepresentations of which it complains.

III.

The plaintiff is entitled to judgment against the defendant in the sum of $10,000 with interest at 6% per annum from August 24, 1935, and the costs of this action." (R. 34, 35)

STATEMENT.

The District Court entered a decree in accordance with its findings and conclusions (R. 35, 36) and the defendant (petitioner) appealed. In its opinion the Circuit Court of Appeals states: (p. 706)

> "The only question involved is whether the insurance company was possessed of facts concerning the subject, or might have ascertained the true facts by further investigation, having been put upon inquiry by information before it when it issued the policy sued on herein."

In the concluding paragraph of its opinion, the Circuit Court of Appeals answers in the affirmative when it says:

> "This case was tried by the court without a jury. Substantial evidence was submitted in support of the facts upon which an equitable estoppel was created. The material findings and the judgment are fully supported by competent evidence. The judgment is affirmed." (l. c. 708)

The Circuit Court of Appeals did not rest its decision on the matters argued in petitioner's motion and brief but rather it answered the argument raised on appellant's (petitioner's) brief and oral argument in that court. The petitioner does not mention plaintiff's Exhibit 17 (R. 93, 94) This letter was from the Medical Examiner of the defendant company to its general agent who wrote the policy of insurance, and briefly states that the reason for the delay in taking prompt action on the application of insured is—"We are investigating applicant's previous insurance record." This letter is dated February 15, 1935, some ten days after the application had been made, and the policy was not issued until thirteen days later, February 28, 1935.

The Circuit Court of Appeals commented on this very matter (p. 707), mentioned that the rejection card turned in by the John Hancock Company was in the possession of the defendant company and was before its proper agents at the time of the issuance of the policy sued on herein, and further said:

> "In the instant case, the insurance company notified its agent that the reason for the delay in taking

prompt action on the application of Paul W. Rodgers, was that appellant was investigating the applicant's previous insurance record."

The court also says the evidence conclusively shows that the card indicated that a criticism of the applicant had been made by another company. (p. 707)

The petitioner's chief underwriter testified:

"I would delay action on the application until the matter had been investigated, until a communication had been sent to the company taking the adverse action, and a reply received; the practice is universal; all companies do it. (R. 73)

I would delay action and make inquiries. (R. 74)

The card indicated a general criticism. It might have been a rejection by another company. (R. 84) It would put defendant 'on the alert'." (R. 85)

He knows the cards come from the Recording and Statistical Corporation, (R. 85) and:

"We send an inquiry through them, and from them it goes to the reporting company, and then the report will come back to us from the reporting company." (R. 85)

SUMMARY OF ARGUMENT.

1. The Findings will not be disturbed.
2. The Petitioner had the duty to make inquiry.
3. The Circuit Court of Appeals decided pleaded issues.

ARGUMENT.

The Findings Will Not Be Disturbed.

The District Court found that defendant company (petitioner herein) had full notice and knowledge of all the facts relating to the previous insurance record of the applicant. (Finding No. 2, R. 35)

In the concluding paragraph of its opinion, the Circuit Court of Appeals finds that—"The material findings and the judgment are fully supported by competent evidence. The judgment is affirmed."

This is conclusive on the petitioner.

Findings of Fact Concurred in by Two Lower Courts will not be Disturbed unless Clearly Erroneous.

United States v. Commercial Credit Co., 286 U. S. 63, 52 S. Ct. 467.

Page v. Arkansas Natural Gas Corporation, 286 U. S. 269, 52 S. Ct. 507.

I. T. S. Rubber Co. v. Essex Rubber Co., 272 U. S. 429, 47 S. Ct. 136.

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Texas & N. O. R. Co. v. Brotherhood of Railway & S. S. Clerks, 281 U. S. 548, 50 S. Ct. 427.

See also *Bruington v. Wagoner,* 100 Kan. 439, 441; 164 Pac. 1057.

> " *** and when the facts are found by the jury and approved by the court, or by the trial court alone if a jury is waived or if it is not a case triable by a jury, the controversy over the facts is ended." (l. c. 441)

See also *Newton v. New York Life Insurance Co.,* 95 Kan. 427; 148 Pac. 619.

The Petitioner had the Duty to Make Inquiry.

The respondent does not deem this point to be controlling in this case for the reason that it proved actual notice, the District Court so found and that finding was affirmed by the Circuit Court of Appeals.

The petitioner argues that it had no duty to make inquiry unless the statements made by the applicant appeared "unreasonable and improbable." That contention might be good in law if the petitioner had had no knowledge of facts contrary to the statements made by the applicant; but it could not shut its eyes and disregard information which it had at the time it considered the application and which

> "means something to the underwriter." (R. 108)
>
> means that another company has created a record concerning him which might be a rejection. (R. 109)
>
> compelled the company to delay action on an application until the matter can be investigated and until a reply has been received from the company taking adverse action. (R. 57, 73, 74, 84, 85)
>
> put the underwriter on the alert. (R. 85)
>
> and on account of which the company sends an inquiry through Recording and Statistical Corporation, the response to which comes from the rejecting company. (R. 85)

The petitioner had this record before it at the time it considered the instant application (R. 87); and thereafter and thirteen days before the policy was issued the petitioner made an investigation of the applicant's previous

insurance record (Ex. 17, R. 93, 94). Granting that in the first instance the petitioner had no obligation to make any independent investigation, it may not embark upon such an investigation, ascertain facts which not only made the applicant's statements "unreasonable and improbable" but which on their face were contrary to the applicant's statements, and then fail, if in fact it did fail, to develop the information which it had acquired. The petitioner could neither in law nor in good faith commence an investigation and, having ascertained the facts which it did in this case, fail to complete it.

At page 4 of its petition, the petitioner predicates its application for writ on false assumptions. The records which it had were *not* consistent with the truth of the statements in the application, neither was the misrepresentation of the assured "conscious and deliberate". There never was a finding that insured made a conscious and deliberate misrepresentation.

On this trial, the District Court found that insured did not knowingly misstate any facts in his application. (Finding No. 4, R. 35) In the first opinion by the Circuit Court of Appeals, 93 Fed. 2d 740, l. c. 742, under the evidence on the first trial, the court said that it must be concluded that the statements made by the insured were knowingly false but that proof of actual, conscious purpose to defraud is unnecessary to invalidate the policy, applying the then rule of the Tenth Circuit.

From the foregoing, it would appear that the reasons given by petitioner for granting the writ must fail.

The decision in this case was handed down December 27, 1937, before the case of *Erie R. Co. v. Tompkins,* 304 U. S. 64; 58 S. Ct. 817; 82 L. Ed. 1188, was decided on April 25, 1938.

The Kansas court holds that fraud is never presumed but must be established by clear, unequivocal and convincing evidence. *United States v. Mammoth Oil Co.,* (C. C. A. — 8) 14 Fed. 2d 705. *Scott v. National Reserve Life Insurance Co.,* 143 Kan. 678, at page 680; 56 Pac. 2d 76.

> "A mere misstatement, unless willful and fraudulent, will not void the policy."
>
> "Of course, it takes more than falsehoods to constitute fraud."

Also:

> Blades v. Insurance Co., 116 Kan. 120; 225 Pac. 1082.
>
> Carver v. Fraternal Citizens, 103 Kan. 824; 176 Pac. 634.
>
> Galloway v. Insurance Co., 112 Kan. 720; 212 Pac. 887.

In the last mentioned case, the Supreme Court of Kansas approved an instruction that if the insured acted in good faith—

> "and the answers were made without fraud or intention to deceive or suppress the facts, then such answers, even though not literally true, would not void the policy or defeat the liability of the defendant thereon. The test is the good faith of the deceased in making the answers she did."

See also *Zolintakis v. Equitable Life Assurance Society,* (C. C. A—10) 108 Fed. 2d 902.

As a result of the first decision by the Circuit Court of Appeals, this case went back to the District Court for a new trial which was had on October 2, 1939, *after the decision in Erie R. Co. v. Tompkins*, supra. The law of Kansas then governed and now governs, and the pronouncements made by the Circuit Court of Appeals in its first opinion do not become the law of this case but they become a nullity. The trial court found that the petitioner had full knowledge of all of the facts prior to the issuance of the policy, (Finding No. 2); that it had certain facts from which it had the duty to make inquiry, as a result of which it could and would have learned all facts, (Finding No. 3); and that the applicant did not knowingly misstate any fact in his application, (Finding No. 4, R. 34, 35); and the trial court concluded as a matter of law that the petitioner had knowledge of all facts (Conclusion No. I) and it waived any defense which it might base on misrepresentation and estopped itself from asserting such defense. (Conclusion II, R. 35)

The findings and judgment were approved by the Circuit Court of Appeals.

The Cases Cited by Petitioner are not in Point.

In none of the cases of Speed v. Hollingsworth, 54 Kan. 436; 38 Pac. 496; Murray v. Davies, 77 Kan. 767; 94 Pac. 283; or Priest v. Life Insurance Co., 116 Kan. 421; 227 Pac. 538, did the adverse party have any knowledge to put him on the alert or any reason or obligation to make inquiry.

In the case of *Dangerfield v. R. R. Co.*, 62 Kan. 85, the party against whom estoppel was sought had no knowledge of the misrepresentation or the facts leading up to it.

The same is true in *Vaughn v. Hixon*, 50 Kan. 773.

In the instant case the insured was *not* held to be guilty of a deliberate, conscious and willful falsehood. (Decision on first appeal, 93 Fed. 2d 740, and findings of the court on the second trial, R. 34, 35.)

In *Harvester Co. v. Hardware Co.*, 101 Kan. 488; 167 Pac. 1057, cited by the petitioner, where the director of a corporation had been deceived by fraudulent statements concerning the status of his corporation the Kansas court refused to charge such director with constructive knowledge of the condition of the corporation since it said it would not impute knowledge on "some legal theory"—(without any knowledge of the facts).

The Circuit Court of Appeals Decided Pleaded Issues.

The petitioner contends that it defended this action on one theory and had no warning that estoppel would be relied upon by the respondent.

In her reply the respondent fully pleaded this very information and the means of knowledge of the petitioner and the fact that the petitioner had knowledge. She pleaded further that the petitioner had estopped itself from asserting a defense based upon misrepresentation. (R. 24) It is the respondent's position that the rule in Kansas is and for many years has been:

> Knowledge which is sufficient to lead an ordinarily prudent person to make inquiry, when by such inquiry it can easily ascertain the facts, constitutes notice of whatever such inquiry would disclose and will be regarded in law as knowledge of the facts.
>
> Stanley v. Indemnity Association, 112 Kan. 412, 416; 210 Pac. 1096.
> Bowland v. McDowell, 132 Kan. 820, 822; 297 Pac. 691.
> Armourdale State Bank v. Homeland Ins. Co., 134 Kan. 245; 5 Pac. 2d 786.
> Dunlap v. Denison, 83 Kan. 757, 760; 112 Pac. 598.
> 20 R. C. L., § 7, p. 346, Notice.
> A. L. I., Restatement of the Law of Agency, Vol. 1, § 9 (c).
> Avery v. Commissioner of Internal Revenue, 22 Fed. 2d 6, 7 (C. C. A.—5)
> Scully v. Porter, 57 Kan. 322, 326; 46 Pac. 313.
> Stadel v. Aikins, 65 Kan. 82; 68 Pac. 1088.
> Maelzer v. Swan, 75 Kan. 496, 498, 499; 89 Pac. 1037.
> Mangum v. Stadel, 76 Kan. 764; 92 Pac. 1093.

and the respondent could not in good conscience accept the facts which it had without making full development and use of them.

At the conclusion of the oral argument in the second trial of this case, the petitioner asked leave to reopen the case for the purpose of taking further testimony of the witness Baker. (R. 26) At the first trial the petitioner introduced the testimony of officers of the petitioner taken on its behalf. At the second trial there was introduced that testimony together with the testimony of other witnesses including Baker, which had been taken

on behalf of the respondent. The petitioner had had ample opportunity to produce whatever testimony it desired and the trial court held that its application to reopen the case came too late. Such a ruling could not be an abuse of discretion.

A reading of the opinion by the Circuit Court of Appeals, 116 Fed. 2d 705, (R. 115) shows conclusively that not only did the appellate court approve the trial court's judgment based upon equitable estoppel but that it approved and sustained the trial court's finding of actual knowledge on the part of the petitioner.

We respectfully contend that the petition for the writ should be denied.

Respectfully submitted,

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END OF

A CASE